



September 10, 2009

The Honorable Rob McKenna
Washington State Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

The Honorable Brian Sonntag
Washington State Auditor
Insurance Building
PO Box 40021
Olympia, WA 98504-0021

Re: Open Government Task Force

Dear Attorney General McKenna and State Auditor Sonntag:

I am writing on behalf of the Center for Justice to express support for the creation of an administrative board that would supplement the current private right of action in regards to violations of Washington's Public Records Act ("PRA") and Open Public Meetings Act ("OPMA.") Washington currently has the good fortune of having both an elected Attorney General and Auditor, who are committed to the rights of everyday citizens to experience open government. Both offices have leveraged their statutory power and resources to provide exceptional education to both citizens and local government officials on the applicable standards of open government, but neither have engaged in actual enforcement of penalties against government agencies that continue to violate on the law on a regular basis. As a result, the average citizen has little recourse to obtain redress for violations of either the PRA or the OPMA. There are a small number of non-government lawyers that regularly obtain exceptional results in trial and appellate courts for their clients and the democratic values embodied in both Acts, but these gains could be significantly broadened by the creation of an administrative board with supplemental authority akin to the Washington Human Rights Commission.

The Center is a non-profit law firm located in Spokane, Washington. One of the Center's core strategies is to advocate in the courts for open government so that citizens can hold their government accountable. The Center's reputation as an effective advocate for open government has grown state-wide over the ten years of its existence. As a result, we are

approached by citizens aggrieved by all levels of government in regards to open government. We turn the vast majority of these potential clients away due to a scarcity of legal resources even though they often have a strong prima facie case. We have partnered with private law firms in order to increase our capacity to represent aggrieved citizens, but most firms can not afford to wait the several years necessary for a potential attorney fee award, and the average client can not afford to pay court costs, let alone legal fees. As a result, the Center and most other lawyers prosecuting open government cases prioritize their representation in order to advance key legal issues in the appellate courts or particularly egregious violations. This leaves the average citizen without any legal recourse and many governments the illusion that they can avoid compliance with open government laws based on a stonewall defense.

I would like to share two examples of past cases that might have been cured by the option of an administrative board with adequate legal authority to order prompt compliance and one current ongoing violation that might still be cured by an administrative board.

Spokane Research and Defense Fund v. City of Spokane, 155 Wash.2d 89 (2005)-

This case began when two investigative journalists submitted public records requests to City of Spokane with the intent of untangling and explaining a complicated public-private financial agreement to redevelop downtown real estate. The City withheld the documents that explained the legal concerns with the agreement under an alleged attorney-client exemption. The reporters were fortunate enough to gain the representation of the Center for Justice and eventually win a unanimous ruling from the Washington Supreme Court. But the damage to the citizens and open government was already complete because the stonewalling prevented important scrutiny of the agreement. Once the withheld documents were released, it was clear that many had no colorable attorney client privilege since they were neither prepared by nor delivered to attorneys and/or had already been published to third parties. The City's financial damages from the ill-fated venture have been estimated at \$45-100 million, which might have been avoided or mitigated with prompt public disclosure. Although the City eventually paid the highest settlement for failing to disclose public records in Washington history at the time, the amount of money at stake in the deal made it insignificant in comparison. A prompt ruling by an administrative board might have resulted in the timely release of the documents and a much reduced timeframe for daily penalties, not to mention the opportunity to either avoid or seek financial redress for the failed public-private partnership.

Neighborhood Alliance of Spokane County v. Spokane County, 2009 WL 2456857 Wash.App. Div. 3, August 9, 2009 (No. 27184-6-III)-

This case began when a whistleblower released a seating chart indicating the possibility that a County Commissioner's son was chosen as a county employee prior to the job announcement being posted. A grass roots good government association sought the electronic records that would have proven that the date of the seating chart's creation was prior to the job posting. Instead, the County provided an electronic record from a new computer that

showed a later date and wiped the hard drive of the original computer. The County was able to avoid providing discovery and a final ruling for over four years. By then, both the County Commissioner and his son were no longer employed by the County and the statute of limitations on any redress had expired. The daily penalties are yet to be determined in this case, but even the maximum penalties will be smaller than the potential damages of an applicant for the position that was potentially illegally excluded from the position. Again, an administrative board with the power to promptly order disclosure of public records could have provided an effective option to the good government association that was far more concerned with prompt disclosure than the amount of penalties.

City of Spokane Police Department Policy of Reserving a Minimum of Ninety Days for Every Public Records Request - The City of Spokane Police Department routinely responds to public records requests with a notice that it will take ninety days to provide the records. This response is provided whether the requestor is seeking one page or a hundred pages. Victims of crime and negligence are especially frustrated by this illegal policy since they often need police reports in order to obtain reimbursement from their insurance companies. No one violation would result in significant penalties and have not attracted the attention of private attorneys, but cumulatively, the hundreds of citizen who seek public records from the Spokane Police Department each year are suffering a substantial interference in their rights to open government and there is no government agency available to assist them. An administrative board could seek to enjoin the department from continuing to engage in this illegal and damaging policy.

An administrative board could also take over the public education and compliance functions that are currently housed in the offices of the Attorney General and the Auditor. While those functions have been fulfilled admirably, it makes financial and functional sense to house them in one agency. In addition to efficiency, combining these functions with enforcement powers would likely lead to more credence by local officials, who currently are free to dismiss the pronouncements of either office because there is no power to enforce the law.

Finally, I wish to emphasize that all citizens should retain the right to seek the private remedies provided by both the PRA and the OPMA. The notoriety of these cases and the occasional penalty for particularly egregious conduct serve as an important deterrent and public education opportunity. Any diminution of those rights would betray the letter and spirit of the PRA and the OPMA. The best model is that employed by the Department of Labor and Industries in collecting unpaid wages and the Washington Human Rights Commission in remedying discrimination. The citizen can voluntarily give up the right for full penalties and/or damages in exchange for a prompt administrative resolution that saves them time and the cost of an attorney. But the right to remain in the court system or opt into an alternative system is retained by the aggrieved citizen, who can best determine which method will meet his or her needs and advance the cause of open government.

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Thank you for giving me and the Center for Justice the opportunity to provide input into the important work of the task force. I have enclosed a brief biography of my professional work and description of the Center for Justice. For more information, please access <http://cforjustice.org>.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Beggs', with a stylized flourish at the end.

Breean L. Beggs
Executive Director

Enclosure

Background Summary for Breean Beggs and Center for Justice

Breean Beggs is Executive Attorney and Lead Attorney at the Center for Justice, a non-profit public interest law firm in Spokane. The Center is dedicated to creating the experience of justice for those of limited resources. The Center's litigation focuses on governmental accountability, environmental health and restoration of civil rights. Current important cases include the law enforcement excessive force, inadequate medical care in prisons, the seizure of funds belonging to pre-conviction jail inmates, illegal storm-water run-off into the Spokane River, municipal sewage treatment plant violations of the Clean Water Act, public records and violations of the public records and open public meeting act. The Center also serves the daily legal needs of those in poverty via its innovative Street Law and Community Advocacy programs. Street Law provides walk-up legal advice in Riverfront Park on twelve Saturday afternoons each summer using private volunteer attorneys. Community Advocacy uses college students and community volunteers under the supervision of a lawyer to provide non-court advocacy and conflict resolution. In 2008, the Center began its Open Government Audit Project across the state of Washington. The Center reviewed reports from the Washington State Auditor's Office that identified clear violations of open government statutes and prosecuted them civilly due to the Auditor and Attorney General's lack of statutory authority to do so. The project has resolved the majority of their cases amicably with the violators and stimulated state-wide discussion regarding the importance of government transparency.

Breean graduated from University of Washington School of Law in 1991 with Order of the Coif honors. He worked in private practice as an associate and then partner in Bellingham in the areas of plaintiff's personal injury, civil rights and employment law until 2004, when he joined the Center. His most memorable legal cases include defending a Bellingham newsstand from trumped up obscenity charges, representing the family of a boy killed by the Olympic Pipeline explosion, confirming a cause of action against DSHS for failure to protect a child from sexual molestation, and representing a mentally ill man who was erroneously seized and then killed by local law enforcement. He has been recognized by the Washington State Bar Association as a Local Hero in 2003 and its Outstanding Young Lawyer in 1996. He has also been recognized as a Super Lawyer by Washington Law and Politics and as the Outstanding Civil Rights Lawyer by Spokane Coeur D'Alene Living Magazine. His public service includes board and volunteer service to church, professional, political, civil rights and social service organizations.